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## PEGUAM NEGARA MALAYSIA v. CHIN CHEE KOW & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
ZAHARAH IBRAHIM CJ (MALAYA)
B
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEALS NO: 01(f)-58-10-2017(P) & 01(f)-59-11-2017(P)]
8 MARCH 2019

C

***ADMINISTRATIVE LAW:*** *Exercise of administrative powers – Discretion – Attorney General ('AG') – Justiciability of AG's consent under s. 9(1) of Government Proceedings Act 1956 – Whether AG's power to give or refuse consent amenable to judicial review – Whether AG's discretionary power derived from statute law and*
D *subject to legal limits – Whether power of judicial review essential to constitutional role of courts – Whether unfettered discretion contradictory to rule of law – Whether AG's power to give consent or otherwise is absolute*

***CONSTITUTIONAL LAW:*** *Attorney General – Authority – Justiciability of AG's consent under s. 9(1) of Government Proceedings Act 1956 – Whether AG's power*
E *to give or refuse consent amenable to judicial review – Whether AG's discretionary power derived from statute law and subject to legal limits – Whether power of judicial review essential to constitutional role of courts – Whether unfettered discretion contradictory to rule of law – Whether AG's power to give consent or otherwise is absolute*

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The appeals herein were in relation to two questions of law, wherein: (i) in Civil Appeal No 58, the question of law was whether the written consent given by the Attorney General ('AG') under s. 9(1) of the Government Proceedings Act 1956 ('Act 359') in respect of civil cases was non-justifiable or non-reviewable; and (ii) in Civil Appeal No 59, the question of law was
G whether the consent given by the AG under s. 9(1) of the Act 359 in respect of civil cases was justifiable or reviewable. The respondent in Civil Appeal No 58, the secretary of the Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan, applied to the High Court for leave to commence judicial review for an order of *certiorari* to quash the decision of the AG rejecting the
H application for consent under s. 9(1) of Act 359 and an order of *mandamus* to compel the AG to grant consent to the respondent's application. The High Court allowed the respondent's application and hence, the AG appealed. The Court of Appeal ('CA'), in dismissing the AG's appeal held, *inter alia*: (i) although it could not be disputed that the AG has unfettered discretion in
I relation to prosecution of criminal offences, based on art. 145 of the Federal Constitution ('Constitution'), there was no such unfettered discretion in

non-criminal matters as in this appeal; (ii) the decision of the AG was not a decision made in a prosecutorial role and therefore, should not involve unfettered discretion; and (iii) a matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority and this was the appropriate situation for the court to exercise its judicial supervision. On the other hand, in Civil Appeal No 59: (i) the first appellant was the registered proprietor of a parcel of land; (ii) the second to fifth appellants were the trustees of the Penang Burmese Trust Property for the welfare and benefit of the Burmese community in Penang; and (iii) the sixth appellant was the Vice-Chairman of the Penang Burmese Trust Property. The appellants' application, at the High Court was for judicial review for an order of *certiorari* to quash the AG's consent and in the alternative, a declaration that the consent was null and void. The High Court dismissed the appellant's application holding that the right to give or refuse consent was within the absolute discretion of the AG and, based on case laws, the applicants could not challenge the consent on whatever grounds. The appellant's appeal to the CA was also dismissed. The central issue in these appeals was whether the court could review a decision of the AG in granting or refusing consent pursuant to s. 9(1) of Act 359. The submission for the AG was that (i) the CA had erred in failing to appreciate and apply the legal principles laid down by the House of Lords in the case of *Gouriet v. Union of Post Office Workers* ('*Gouriet*'s case') in holding that the decision of the AG under s. 9(1) of Act 359 was amenable to judicial review; (ii) the AG's decision in granting or refusing consent under s. 9(1) of Act 359 is akin to the AG's consent to criminal prosecutions, where such consent is required by statute, a significant prerogative power of the AG; (iii) in the exercise of these powers, the AG is not subject to control and supervision by the courts and the AG's role as the guardian of public interest in considering whether to grant or otherwise his consent pursuant to s. 9(1) of Act 359 should remain outside the court's jurisdiction. The rationale underpinning the submission was that the AG is accountable to Parliament and not to the courts; and (iv) the AG was not a public officer or public authority within O. 53 of the Rules of Court 2012.

**Held (dismissing Civil Appeal No 58; allowing Civil Appeal No 59)**
**Per Mohd Zawawi Salleh FCJ delivering the judgment of the court:**

**(1)** Not all cases brought before the courts are reviewable. A court must first examine, *inter alia*, its justiciability. 'Justiciability' concerns the limit upon legal issues over which a court can exercise its judicial authority. Non-justiciability, in its administrative law sense, signifies that a matter is not capable of, or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief. (para 48)

**(2)** The judgment in the *Gouriet*'s case, where, the House of Lords upheld the contention that the AG was accountable to the public only through Parliament, was a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the court had been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power. In the case of *Council of Civil Service Unions v. Minister for the Civil Service*, the prerogative powers of the AG were not expressly considered. However, the necessary implication of the decision was that these powers were potentially open to judicial scrutiny by the courts, except for a list of prerogatives categorised as being non-reviewable 'because their nature and subject matter are such as not to be amenable to judicial process.' The list had largely been accepted, and there was an indication that judges had continued to move with a degree of circumspection, and even in reaction against such development. (paras 56, 57, 61 & 63)

**(3)** The decision in *Brown v. Executor of the Estate of HM Queen Elizabeth, the Queen Mother* suggested that the decision in *Gouriet*'s case was no longer good law and the basis upon which it was decided no longer prevailed. The present position is the AG is no longer regarded as the sole guardian of what is public interest, which was a central principle of the decision in *Gouriet*'s case. In England, private individuals may now properly seek judicial review of decisions of the Public Prosecutor, whether or not to initiate criminal proceedings. The power did not exist at the time of the judgment in *Gouriet*'s case. (paras 69-72)

**(4)** Having considered the principles of law on the subject, as propounded by the courts in other jurisdictions, the court found no flaw in the reasoning by the CA in Civil Appeal No 58 in holding that the power of the AG to give or refuse consent under s. 9(1) of Act 359 was amenable to judicial review. The issue whether the AG is a public officer has also been settled. In *Tun Dato Haji Mohamed Salleh Abas v. Tan Sri Dato Abdul Hamid Haji Omar & Ors*, it was held that the AG was indeed a public officer under the Constitution and art. 145 gives ample power to the AG to represent the government or person performing any functions under the Constitution. The AG's discretionary power to give or refuse consent pursuant to s. 9(1) of Act 359 derives from a statute law and any restrictions and conditions applicable to statutory power cannot be ignored. (paras 77-79)

**(5)** In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case*, it was held that the power of judicial review cannot be changed or altered by Parliament by way of a constitutional amendment. Further, it was stated that the power of judicial review is essential to the constitutional role of the courts and inherent in the basic structure of the

Constitution. The Federal Court's reassertion of constitutional judicial power and its status as the superior court meant that the power of the AG to grant or refuse consent under s. 9(1) of Act 359 is amenable to judicial review. (para 81)

**(6)** An unfettered discretion is contradictory to the rule of law. Therefore, the AG's power to give consent or otherwise, under s. 9(1) of Act 359, is not absolute and is subject to legal limits. In the circumstances, the question in Civil Appeal No 58 was answered in the negative and the appellant's appeal was dismissed. The question in Civil Appeal No. 59 was answered in the affirmative and the appellant's appeal was allowed. (paras 83 & 85)

***Bahasa Malaysia*** *Headnotes*

Kedua-dua rayuan ini berkaitan dua soalan undang-undang, iaitu: (i) dalam Rayuan Sivil No 58, soalan undang-undang adalah sama ada persetujuan bertulis yang diberi oleh Peguam Negara ('AG'), bawah s. 9(1) Akta Prosiding Kerajaan 1956 ('Akta 359'), berhubung kes sivil, tidak boleh diadili atau tidak boleh disemak; dan (ii) dalam Rayuan Sivil No 59, soalan undang-undang adalah sama ada persetujuan yang diberi oleh AG, bawah s. 9(1) Akta 359, berhubung kes sivil, boleh diadili atau boleh disemak. Responden dalam Rayuan Sivil No 58, setiausaha Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan, memohon kepada Mahkamah Tinggi untuk kebenaran memulakan semakan kehakiman untuk perintah *certiorari* membatalkan keputusan AG menolak permohonan terhadap persetujuan bawah s. 9(1) Akta 359 dan satu perintah *mandamus* mendesak AG memberi persetujuan untuk permohonan responden. Mahkamah Tinggi membenarkan permohonan responden dan dengan itu, AG merayu. Mahkamah Rayuan ('MR') menolak rayuan AG memutuskan, antara lain: (i) walaupun tidak dipertikaikan bahawa AG mempunyai budi bicara tanpa batasan berkaitan dengan pendakwaan kesalahan jenayah berdasarkan per. 145 Perlembagaan Persekutuan ('Perlembagaan'), tiada budi bicara tanpa batasan sedemikian dalam perkara bukan jenayah seperti dalam rayuan ini; (ii) keputusan AG bukan keputusan yang dibuat dalam peranan pendakwaan, dan oleh itu, tidak wajar melibatkan budi bicara tanpa batasan; dan (iii) sesuatu perkara tidak boleh diadili jika mahkamah tiada kuasa menghakimi pertikaian kerana kebolehadilan berkaitan dengan pelaksanaan kuasa penyeliaan mahkamah terhadap had isu undang-undang. Sebaliknya, dalam Rayuan Sivil No 59: (i) perayu pertama ialah pemilik berdaftar sebidang tanah; (ii) perayu kedua hingga kelima adalah pemegang amanah Penang Burmese Trust Property demi kebajikan dan faedah komuniti Burma di Pulau Pinang; dan (iii) perayu keenam ialah Naib Pengerusi Penang Burmese Trust Property. Permohonan perayu-perayu di Mahkamah Tinggi adalah untuk semakan kehakiman untuk perintah *certiorari* membatalkan

persetujuan AG, dan sebagai alternatif, satu deklarasi bahawa persetujuan tersebut terbatal dan tidak sah. Mahkamah Tinggi menolak permohonan perayu-perayu, memutuskan hak memberi atau menafikan persetujuan adalah budi bicara mutlak AG dan, berdasarkan undang-undang kes, pemohon-pemohon tidak boleh mencabar persetujuan atas apa-apa alasan sekali pun. Rayuan perayu ke MR juga ditolak. Isu utama dalam rayuan-rayuan ini adalah sama ada mahkamah boleh menyemak keputusan AG memberi atau menolak persetujuan menurut s. 9(1) Akta 359. Hujahan AG adalah (i) MR terkhilaf apabila gagal mempertimbangkan dan mengguna pakai prinsip undang-undang yang dikemukakan House of Lords dalam kes *Gouriet v. Union of Post Office Workers* ('kes *Gouriet*') yang memutuskan keputusan AG bawah s. 9(1) Akta 359 tertakluk pada semakan kehakiman; (ii) keputusan AG memberi atau menolak persetujuan, bawah s. 9(1) Akta 359, sama seperti persetujuan AG dalam pendakwaan jenayah, iaitu, persetujuan tersebut diperlukan bawah statut, satu kuasa prerogatif penting AG; (iii) dalam melaksanakan kuasa-kuasa tersebut, AG tidak tertakluk pada kawalan dan penyeliaan mahkamah-mahkamah dan peranan AG sebagai penjaga kepentingan awam dalam mempertimbangkan sama ada persetujuan bawah s. 9(1) Akta 359 perlu diberi atau tidak, wajar kekal luar bidang kuasa mahkamah. Rasional menyokong hujahan tersebut adalah AG bertanggungjawab pada Parlimen dan bukan pada mahkamah-mahkamah; dan (iv) AG bukan pegawai awam atau pihak berkuasa awam dalam maksud A. 53 Kaedah-kaedah Mahkamah 2012.

**Diputuskan (menolak Rayuan Sivil No 58; membenarkan Rayuan Sivil No 59)**

**Oleh Mohd Zawawi Salleh HMP menyampaikan penghakiman mahkamah):**

**(1)** Bukan semua kes yang dikemukakan di mahkamah boleh disemak. Mahkamah perlu, pertama sekali, memeriksa, antara lain, kebolehadilannya. 'Kebolehadilan' berkait dengan had isu undang-undang terhadap mana mahkamah boleh melaksanakan kuasa kehakimannya. Ketidakbolehadilan, dari segi undang-undang pentadbiran, bermaksud satu-satu perkara tidak boleh, atau terbuka untuk disemak secara kehakiman serta ketidakbolehadilan dalam maksud tiada bidang kuasa untuk melayan sesuatu isu atau memberi relief yang dipersetujui.

**(2)** Penghakiman dalam kes *Gouriet*, apabila House of Lords mengesahkan hujahan bahawa AG bertanggungjawab kepada awam hanya melalui Parlimen, adalah bayangan keengganan terdahulu kehakiman untuk mempersoal cara pelaksanaan kuasa prerogatif. Dengan perkembangan progresif semakan kehakiman, mahkamah lebih bersedia menyemak pelaksanaan kuasa budi bicara, sama ada yang terbit daripada statut atau

kuasa prerogatif. Dalam kes *Council of Civil Service Unions v. Minister for the Civil Service*, kuasa prerogatif AG tidak dipertimbangkan secara langsung. Walau bagaimanapun, implikasi wajar keputusan itu adalah kuasa-kuasa ini berpotensi terbuka untuk penilaian kehakiman oleh mahkamah-mahkamah, kecuali yang tersenarai sebagai kategori prerogatif yang tidak boleh disemak 'kerana sifat dan hal perkara tersebut tidak tertakluk pada proses kehakiman.' Senarai tersebut diterima secara luas, dan terdapat indikasi bahawa hakim-hakim terus mara dengan berhati-hati, dan juga dengan bertindak balas terhadap perkembangan sedemikan.

**(3)** Keputusan dalam *Brown v. Executor of the Estate of HM Queen Elizabeth, the Queen Mother* mencadangkan bahawa keputusan kes *Gouriet* bukan lagi undang-undang yang terpakai dan asas keputusan tersebut tidak lagi kekal. Kedudukan pada masa kini adalah AG tidak lagi dianggap sebagai pelindung tunggal apa yang dikatakan kepentingan awam, yang adalah prinsip utama keputusan kes *Gouriet*. Di England, seorang individu kini boleh sewajarnya memohon semakan kehakiman keputusan-keputusan Pendakwa Raya, sama ada untuk atau tidak memulakan prosiding jenayah. Kuasa tersebut tidak wujud semasa penghakiman kes *Gouriet*.

**(4)** Setelah mempertimbangkan prinsip undang-undang dalam perkara tersebut seperti yang dikemukakan mahkamah-mahkamah dalam bidang kuasa lain, mahkamah ini mendapati tiada kekhilafan dalam alasan MR dalam Rayuan No 58 memutuskan kuasa AG untuk memberi atau menolak persetujuan bawah s. 9(1) Akta 359 tertakluk pada semakan kehakiman. Isu sama ada AG ialah pegawai awam juga telah diputuskan. Dalam kes *Tun Dato Haji Mohamed Salleh Abas v. Tan Sri Dato Abdul Hamid Haji Omar & Ors*, diputuskan bahawa AG sememangnya pegawai awam bawah Perlembagaan dan per. 145 memberi kuasa yang luas kepada AG untuk mewakili Kerajaan atau seseorang yang melaksanakan apa-apa fungsi bawah Perlembagaan. Kuasa budi bicara AG untuk memberi atau menolak persetujuan menurut s. 9(1) Akta 359 terbit daripada undang-undang statut dan apa-apa had dan syarat-syarat yang terpakai pada kuasa statutori tidak boleh diendahkan.

**(5)** Dalam kes *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* diputuskan bahawa kuasa semakan kehakiman tidak boleh ditukar atau diubah oleh Parlimen secara pindaan perlembagaan. Selanjutnya, dinyatakan bahawa kuasa semakan kehakiman adalah penting untuk peranan perlembagaan mahkamah-mahkamah dan sedia ada dalam struktur asas Perlembagaan. Penerapan semula oleh Mahkamah Persekutuan tentang kuasa kehakiman berperlembagaan dan statusnya sebagai mahkamah tertinggi bermaksud bahawa kuasa AG untuk memberi atau menolak persetujuan bawah s. 9(1) Akta 359 tertakluk pada semakan kehakiman.

**(6)** Kuasa tanpa batasan bercanggah dengan kaedah undang-undang. Oleh itu, kuasa AG untuk memberi persetujuan atau sebaliknya, bawah s. 9(1) Akta 359, bukan mutlak dan tertakluk pada batasan undang-undang. Dalam hal keadaan tersebut, soalan dalam Rayuan Sivil No 58 dijawab secara negatif dan rayuan perayu ditolak. Soalan undang-undang dalam Rayuan Sivil No 59 dijawab secara afirmatif dan rayuan perayu dibenarkan.

**Case(s) referred to:**

*Attorney-General At And By The Relation Of Pesurohjaya Ibu Kota, Kuala Lumpur v. Wan Kam Fong & Ors [1967] 1 LNS 7 HC* ***(refd)***

*Brown v. Executor of the Estate of HM Queen Elizabeth, the Queen Mother [2008] 1 WLR 2327* ***(refd)***

*Campaign for Nuclear Disarmament v. Prime Minister [2002] EWHC 2777* ***(refd)***

*Chng Suan Tze v. Minister for Home Affairs [1988] 2 SLR(R) 525* ***(refd)***

*Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (HL)* ***(refd)***

*Gouriet v. Union of Post Office Workers [1978] AC 435* ***(not foll)***

*Gouriet v. Union Of Post Office Workers And Others [1977] 2 WLR 310* ***(refd)***

*Law Society of Singapore v. Tan Guat Neo Phyllis [2008] 2 SLR(R) 49* ***(refd)***

*London County Council v. Attorney-General [1902] AC 165* ***(refd)***

*Mohit v. The Director of Public Prosecutions of Mauritius [2006] UKPC 20* ***(refd)***

*Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lembah Enterprise Sdn Bhd [1978] 1 LNS 143 FC* ***(refd)***

*R v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 QB 864 (DC)* ***(refd)***

*R v. Crown Prosecution Service [2011] EWHC 472 (Admin)* ***(refd)***

*R v. DPP, Ex parte Duckenfield [2000] 1 WLR 55* ***(refd)***

*R v. Ministry of Defence, ex parte Smith [1995] EWCA Civ 23* ***(refd)***

*R v. Secretary of State for Home Department, ex parte Hosenball [1977] 1 WLR 766* ***(refd)***

*R (B) v. Director of Public Prosecutors (Equality and Human Rights Commission intervening) [2009] EWHC 106* ***(refd)***

*R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] 3 WLR 955* ***(refd)***

*Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC* ***(refd)***

*Tan Seet Eng v. Attorney-General [2016] 1 SLR 779* ***(refd)***

*Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC* ***(refd)***

*The State v. Ilori [1983] 1 SCNLR 94* ***(refd)***

*Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC* ***(foll)***

**Legislation referred to:**

Federal Constitution, art. 145

Government Proceedings Act 1956, s. 9(1)

Rules of Court 2012, O. 53

Post Office Act 1953 [UK], s. 68

**Other source(s) referred to:**

*Halsbury's Laws of Malaysia*, vol 3(1) 2015 Reissue, pp 68-69

Leyland & Anthony, *Express and Implied Limits on Judicial Review: Ouster and Time Limit Clauses, the Prerogative Power, Public Interest Immunity*, Textbook on Administrative Law, 6th edn, Oxford University Press 2009, pp 392-437

Michael Supperstone, James Goudie and Paul Walker, *Judicial Review*, 3rd edn, London: Butterworths, 1992, pp 129-130

John Llewelyn Jones Edwards, *The Attorney-General, Politics and the Public Interest,* Sweet & Maxwell, London 1984, pp 29-30

*(Civil Appeal No: 01(f)-58-10-2017(P))*
*For the appellant - Shamsol Bolhassan & Rosli Ahmad; SFC*
*For the respondent - Ravi Chandran; M/s SC Ravi & Assocs*

*(Civil Appeal No: 01(f)-59-11-2017(P))*
*For the appellants - Karin Lim Ai Ching & A Suppiah; M/s Juli & Ameleena*
*For the 1st respondent - Shamsol Bolhassan & Rosli Ahmad; SFC*
*For the 2nd respondent - Ravin Vello; M/s Vello & Assocs*
*For the 3rd respondent - Balwant Singh & T Gunaseelan; M/s Balwant Singh & Co*

*(Civil Appeal No: 01(f)-58-10-2017(P))*
*[Editor's note: For the Court of Appeal judgment, please see Peguam Negara Malaysia v. Chin Chee Kow [2018] 1 LNS 1273 (affirmed); For the High Court judgment, please see [2017] 2 CLJ 431 (affirmed).]*

*(Civil Appeal No: 01(f)-59-11-2017(P))*
*[Editor's note: Appeal from Court of Appeal; Civil Appeal No: P-01(A)-5-01-2017 (overruled); Appeal from High Court, Pulau Pinang; Judicial Review No: PA-25-32-08-2016 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Mohd Zawawi Salleh FCJ:**

### Introduction

**[1]** There are two appeals before us, namely:

(i) Civil Appeal No. 01(f)-58-10-2017(P) ("Civil Appeal No. 58"); and

(ii) Civil Appeal No. 01(f)-59-11-2017(P) ("Civil Appeal No. 59").

**[2]** This court had directed that both appeals be heard together. The leave questions in respect of which applications for leave to appeal were allowed in these appeals were in relation to the justiciability of the Attorney General's consent or his refusal to give consent under s. 9(1) of the Government Proceedings Act 1956 ("Act 359").

**[3]** The question of law in Civil Appeal No. 58 is as follows:

> Whether the written consent given by the Attorney General under section 9(1) of the Government Proceedings Act 1956 in respect of civil cases is non-justifiable or non-reviewable.

**[4]** The question of law in Civil Appeal No. 59 is as follows:

> Whether the consent given by the Attorney General under section 9(1) of the Government Proceedings Act 1956 in respect of civil cases is justifiable or reviewable.

**[5]** We heard both appeals together on 12 December 2018. After having heard the counsel representing the appellants and the respondents, and after having perused the records of appeal and the relevant case laws, we unanimously dismissed Civil Appeal No. 58 and allowed Civil Appeal No. 59. The reasons for so doing are set out below.

**Factual Background And The Antecedent Proceedings**

**[6]** These cases have had a chequered history with a number of legal skirmishes. Therefore, it is necessary to narrate the facts at some length in order to appreciate and decide the leave questions posed.

**[7]** The factual background of these appeals have been sufficiently set out by both trial judges in their respective grounds of judgment. We will not repeat the entire factual background save for those parts which are relevant to this judgment.

**Civil Appeal No. 58**

**[8]** The parties in Civil Appeal No. 58 are as follows:

Appellant

The appellant is the Attorney General of Malaysia ("AG").

Respondent

The respondent is the Secretary of the Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan ("the said Association"). The said Association comprises of followers of the Buddhist faith and devotees of the Deity Liam Hood Thong Chor Seng Thuan ("the said Deity").

**[9]** One Cheah Leong Kean, deceased ("the testator") made a public charitable trust in his will that RM15,000 be given to his children Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang ("the initial trustees") to construct a Pagoda and outhouses.

**[10]** Then by an indenture dated 6 March 1941, four parcels of land were transferred to the initial trustees and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the Pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the said Deity.

**[11]** The four parcels of land referred to in para. 10 are situated in Section 1, Georgetown, North East District, Penang ("the said lands"):

(i) Geran No. 20348 Lot 491;

(ii) Geran No. 20349 Lot 492;

(iii) Geran No. 5935 Lot 292; and

(iv) Geran No. 20273 Lot 960,

**[12]** The initial trustees had failed to ensure that building works were carried out as per the terms of the trust and the trust funds were all spent. On 20 August 1982, Mustapha Hussain JC (as His Lordship then was) held in Penang Originating Summons No. 387 of 1971 that a trust to construct a Pagoda is a public charitable trust and that the *cy-pres* doctrine be applicable.

**[13]** Since that order, the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo ("the current trustees"). However, it was alleged that there has been no effort by the current trustees to carry out the wishes of the testator and the said lands have been left vacant.

**[14]** The said Association had endeavoured to secure funding from third parties to build the Pagoda. However, as a pre-condition of the promised funds, it was necessary for the said Association to be appointed as a trustee, to provide it with the requisite legal standing to execute agreements on behalf of the said trust.

**[15]** In view of the above, the said Association had *vide* letters dated 20 November 2014 and 6 July 2015 applied to the AG for the consent under s. 9(1) of Act 359 so that an application could be made to the High Court for the said Association to be made a trustee in addition to or to replace the current trustees.

**[16]** The AG *vide* a letter dated 17 February 2016 rejected the said Association's application on the ground that consent had been given to the current trustees on 15 March 2014. Dissatisfied with the decision, the respondent, acting in his capacity as the secretary of the said Association, applied to the High Court at Penang for leave to commence judicial review for an order of *certiorari* to quash the decision of the AG dated 17 February 2016 and an order of *mandamus* to compel the AG to grant consent to the application. The AG objected to the leave application on the ground that the said refusal is non-justiciable.

**[17]** However, on 28 September 2016, the High Court allowed the respondent's application and granted leave to the respondent to commence judicial review proceedings. The High Court held as follows:

> [19] The submission by the Senior Federal Counsel that "the decision of the AG belongs to the AG" is untenable.
>
> [20] This court is of the considered opinion that the absolute discretion of the respondent (if at all it exists) is only pertaining to criminal offences whereas this case involves the discretion or authority of the Respondent in a non-prosecutorial role hence it should not involve an unfettered discretion.

**[18]** The AG then appealed to the Court of Appeal against the decision of the High Court, but the same was dismissed. The Court of Appeal held that:

> [26] We fully agreed with learned counsel for the respondent on this issue. In *Gouriet*, *supra*, there was a proposed temporary union ban on communications to and from South Africa, which would have been criminal, and yet the Attorney General had refused to sue or lend his name to a relator action, *Gouriet*, *supra* was concerned with the enforcement of the criminal law by way of an injunction in a civil suit. This is not the case with our instant appeal. The respondent herein did not file a suit to enforce the criminal law. His application was for a judicial review on the refusal of the Attorney General to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the Attorney General has unfettered discretion in relation to prosecution of criminal offence based on Article 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal.
>
> ...
>
> Issue III: The Attorney General's decision was justiciable?
>
> [24] Next issue raised by the learned SFC was on non justiciability of the decision of the Attorney General under section 9 of the GPA. He relied heavily on the House of Lord's case of *Gouriet v. Union of Post Office Worker* (1978) AG 435 especially on the following passage:
>
> > ... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney General.
>
> [25] Learned counsel for the respondent submitted that *Gouriet*'s case, *supra*, concerned a relator action in England and therefore the reliance on the case was misconceived. He relied on the case of *Teh Guat Hong*, *supra*. Further the decision of the Attorney General herein was not a decision made in a prosecutorial role and therefore should not involve unfettered discretion.
>
> [26] We fully agreed with learned counsel for the respondent on this issue. In *Gouriet*, *supra*, there was a proposed temporary union ban on communications to and from South Africa, which would have been criminal, and yet the Attorney General had refused to sue or lend his name to a relator action. *Gouriet*, *supra*, was concerned with the enforcement of the criminal law by way of an injunction in a civil suit. This is not the case with our instant appeal. The Respondent herein did not file a suit to enforce the criminal law. His application was for a judicial review on the refusal of the Attorney General to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the Attorney General has unfettered discretion in relation to prosecution of criminal offence based on Article 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal.

[27] A matter is non justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 6 MLJ 812. We opined there cannot be any absolute discretion in civil law particularly when it involves public, as this can lead to abuse. This appeal in our considered view, obviously involved public interest. 35 years had lapsed and there still had been no effort by the existing Trustee to carry out the wishes of the Testator's will. On the face of section 9 of GPA, the respondent cannot take action without the Attorney General, where else could the respondent turn to but the court. We opined, the law cannot be too rigid. To borrow the words of Lord Denning in the English Court of Appeal of *Gouriet*'s case [1977] QB 729, "What is to be done about it? The courts to stand idly by? Is the Attorney General the final arbiter as to whether the law should be enforced or not?" We were of the considered view, looking at the facts of this case, this was the appropriate situation for the court to exercise its judicial supervision.

**[19]** Aggrieved with the decision of the Court of Appeal, the AG had applied for and obtained leave to appeal from the Federal Court on 16 October 2017. Hence, this appeal before us.

**Civil Appeal No. 59**

**[20]** The parties in Civil Appeal No. 59 may be described as follows:

Appellants

(i) The first appellant is the registered proprietor of a parcel of land known as Lot No. 10029, Section 4, Georgetown, North East District, Penang held under Geran No. Hakmilik HSD 18532 ("Lot No. 10029").

(ii) The second to fifth appellants are the trustees of the Penang Burmese Trust Property for the welfare and benefit of the Burmese community in Penang. The transfer of Lot No. 10029 was effected by the second to fifth appellants to the first appellant.

(iii) The sixth appellant is the Vice-Chairman of the Penang Burmese Trust Property.

Respondents

(i) The first respondent is the AG.

(ii) The second respondent is a Thai descendant and claims to be the owner of premises known as No. 3, Burmah Lane, Penang ("the said premises"). The said premises was erected on Lot No. 10029. He is the plaintiff in the Penang High Court Originating Summons No. 24NCVC-1128-12-2014 ("OS 1128"). The first to fifth appellants are the defendants in OS 1128.

A (iii) The third respondent claims to be of Burmese descent and he is the second plaintiff in OS 1128.

**[21]** The dispute herein revolves around a piece of land formerly known as Lot No. 2103 held under Geran No. 61390 ("Lot No. 2103"). Lot No. 2103 was originally part of a land known as Lot No. 104, Section 4, B Georgetown, North East District, Penang held under Geran (First Grade) No. 6719 ("Lot No. 104"). Lot No. 104 with a temple erected thereon was the subject matter of a religious and charitable trust created by the East India Company on behalf of Queen Victoria on 30 May 1845 for the benefit of the Burmese and Thai communities in Penang, with no power to *inter alia*, sell, C transfer or otherwise alienate the land and it was to remain and continue for the benefit of such communities ("the Burmese-Thai Trust").

**[22]** The trustees of both Burmese and Thai communities had entered into an agreement to partition Lot No.104 which was later endorsed by a court order dated 19 October 1994 (made in Penang High Court Originating D Summons No. 24-665-1994). Pursuant to the court order, Lot No. 104 was partitioned into two lots, namely:

(i) Lot No. 2102, to be taken by the trustees of the Thai community ("the Thai Trust Property"); and

E (ii) Lot No. 2103, to be taken by the trustees of the Burmese community ("the Burmese Trust Property").

**[23]** On 1 June 2000, the AG gave his written consent under s. 9 of Act 359 and it was stated, *inter alia*, as follows:

F (i) that the AG consented to the commencement of a proceeding at the High Court at Penang to apply for the appointment of trustees respectively for the Burmese community and the Thai community;

(ii) that Lot. No. 2102 be vested in the name of the trustees of the Thai community;

G (iii) that Lot No. 2103 be vested in the name of the trustees of the Burmese community; and

(iv) the trust funds be divided equally between the trustees of the Burmese community and the Trustees of the Thai community.

H **[24]** Based on the said consent, the Thai-Burmese Trustees filed Penang High Court Originating Summons No. 24-1209-2002. By way of an order dated 3 October 2002, the receiver of the Burmese-Thai Trust was discharged as the receiver and he was ordered to pay the sum of RM1,889,261.86 to the Burmese trustees and the sum of RM1,889,261.86 to the Thai trustees.

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**[25]** Based on the said order, the second to fifth appellants executed a trust deed dated 31 July 2006 stating that they have consented to be appointed as the Penang Burmese trustees of the Burmese community of Penang and Lot No. 2103 would be held on trust by them.

**[26]** The second to fifth appellants then entered into a joint venture agreement ("the JVA") dated 25 August 2006 with a developer known as Aimas Development Sdn Bhd to develop Lot No. 2103 by constructing a 3-storey shop-offices or other commercial buildings. The JVA was endorsed by a court order dated 31 October 2007 (made in Penang High Court Originating Summons No. 24-376-2007). The first appellant was incorporated as a corporate joint venture vehicle to undertake the development of commercial properties.

**[27]** As Lot No. 2103 was zoned as partly commercial and partly religious, the Georgetown City Council imposed a requirement that Lot No. 2103 be subdivided for the purpose of submission of development plan on part of Lot No. 2103. In July 2013, Lot No. 2103 was subdivided into two lots known as Lot No. 10029 (Geran No. Hakmilik HSD 18532) and Lot No. 10030 (Geran No. Hakmilik HSD 18533). Lot No. 10029 was issued under the name of the first appellant and Lot No. 10030 was issued under the name of the second to fifth appellants.

**[28]** The first appellant then filed a legal action at the Sessions Court at Georgetown by way of Civil Suit No. A52-144-08-2014 against the second respondent, seeking, *inter alia*, for vacant possession of the premises erected on Lot No. 10029, damages and costs. On 31 July 2015, the suit was transferred to the Penang High Court and it was subsequently registered as Civil Suit No. PA- 22NCVC-34-02-2016. The said suit is pending hearing at the Penang High Court.

**[29]** In the statement of defense and counterclaim, the second respondent averred that he need not deliver vacant possession of the said premises on ground that the land is part of the subject matter of a public trust under s. 9 of Act 359 and therefore it could not be sold and transferred without the consent of the AG.

**[30]** Subsequent thereto, the second respondent filed OS 1128 against the first to fifth appellants and applied for, amongst others, the following reliefs:

(i) an order to set aside *ex debito justitae* the registration of the first to fifth appellants as the owners of Lot No. 10029 and Lot No. 10030 on the grounds of lack of jurisdiction and absence of consent from the AG under s. 9 of Act 359;

(ii) a permanent injunction to restrain the first to fifth appellants and their agents from acting as registered owners of the public trust properties;

(iii) an order that the first to fifth appellants furnish statements of account of the Penang Burmese Trust Property to court; and

(iv) an order that all monies which had been used by the trustees of the Penang Burmese Trust Property after 31 October 2007 in relation to accounts of the Penang Burmese Trust Property be returned forthwith and deposited into court and then to the Burmese community in Penang.

**[31]** After filing OS 1128, the second respondent on 20 August 2015 wrote to the AG for his consent to proceed with the said OS. On 31 May 2016 the AG gave his written consent to the second and third respondents. Based on the said consent, the third respondent intervened in the proceedings and was added as the second plaintiff in OS 1128.

**[32]** The appellants, after having discovered that consent had been given to the second and third respondents, filed an *ex parte* application at the High Court for judicial review for an order of *certiorari* to quash the AG's consent dated 31 May 2016 and in the alternative, a declaration that the said consent is null and void. The appellants' challenge to the consent dated 31 May 2016 is premised on the following grounds:

(i) the AG had failed to take into consideration the relevant facts ie, the events which had transpired and the orders which had been given by the High Court from year 1994 until year 2007 have not been set aside; and

(ii) the second and third respondents, who are not of Burmese descent, have no *locus* to interfere into the affairs of the Penang Burmese Trust.

**[33]** At the hearing of the leave application, the AG had objected on the ground that decision of the AG to give consent is non-justiciable.

**[34]** The High Court upheld the AG's objection and dismissed the appellants' application with no order as to costs. The High Court held as follows:

> ... I agree with SFC's submission. The right to give or refuse consent is within the absolute discretion of the Attorney General. In this case, the Attorney General had exercised his discretion to give consent. The case law shows the applicants cannot challenge the consent on whatever grounds. Therefore, there are no merits in the grounds relied upon by the applicants. The issue of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided by the courts in Suit 22NCVC-34-02/2016 and Originating Summons No. 24NCVC-1128-12/2014. These issues cannot be resolved by way of judicial review. It is pre-mature at this stage for the applicants to ask the court to declare the Burmese Trust is a private trust. Each party should be given opportunity to prove its case.

**[35]** Being aggrieved with the decision of the High Court, the appellant then appealed to the Court of Appeal. On 12 April 2017, the Court of Appeal unanimously dismissed the appellant's appeal. While the Court of Appeal disagreed with the High Court's decision that the AG's consent is non-justiciable, the Court of Appeal held:

> [16] However, looking back at the decision of the learned High Court Judge we fully agreed with the learned High Court Judge that the issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided in suit 22 NCVC-34-02/2016 and OS 1128. The appellants in their Judicial Review application had sought *inter alia* for a declaration that the Penang Burmese Trust created under the Trust Deed dated 31.7.2006 is a valid private trust. We agreed with the learned High Court Judge that it is premature to seek such a relief the issue cannot be resolved simply by way of Judicial Review. The issues raised require serious discussion and examination at a proper trial. Witnesses need to be called and each party to be given opportunity to ventilate the issue and for the court to evaluate. It cannot definitely be exercised by mere examination of the documents.

**[36]** Being dissatisfied with the decision of the Court of Appeal, the appellants had applied for and obtained leave from the Federal Court on 16 October 2017. Hence, this appeal before us.

**Issue - Justifiability Of The AG's Decision**

**[37]** The central issue in these appeals is whether the court can review a decision of the AG in granting or refusing consent pursuant to s. 9(1) of Act 359.

**Submission Of The AG's Chambers**

**[38]** Learned Senior Federal Counsel ("SFC") submitted that the Court of Appeal had erred in failing to appreciate and apply the legal principles laid down by the House of Lords in the case of *Gouriet v. Union of Post Office Workers* [1978] AC 435 ("the *Gouriet*'s case") in holding that the decision of the AG under s. 9(1) of Act 359 is amenable to judicial review.

**[39]** It was the contention of the learned SFC that although the *Gouriet*'s case concerns relator proceedings for the purpose of enforcing the criminal law by means of injunction, the Law Lords' comments are of more general relevance, in particular the alleged reviewability by the courts of the Attorney General's prerogative powers. Our attention was drawn to Lord Wilberforce's judgment, at p. 482 of the *Gouriet*'s case as follows:

> The Attorney-General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent

A special interest) cannot seek to enforce, and private rights, is fundamental in our law. To break it, as the plaintiff's counsel frankly invited us to do, is not a development of the law, but a destruction of one of its pillars. Nor, in my opinion, at least in this particular field, would removal of the distinction be desirable. More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, B involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make: see *Attorney-General v. Bastow* [1957] 1 Q.B. 514.

This brings me to the second argument. Surely, it is said, since the whole matter is discretionary it can be left to the court. The court can prevent C vexatious or frivolous, or multiple actions: the court is not obliged to grant an injunction: leave it in the court's hands. I cannot accept this either. The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary D problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.

**[40]** Learned SFC then referred us to the oft-quoted *dictum* by Viscount Dilhorne at pp. 487-488 of the *Gouriet*'s case:

E The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over F the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.

... in my opinion the view that refusal of consent to a relator action is an exception to the general rule and is subject to review by the courts must be rejected. It is because I think it is undesirable that any judicial G observations suggesting that the exercise by the Attorney-General of these functions and duties is subject to control, supervision and review by the courts should be left unanswered that I have ventured to make these observations.

**[41]** Learned SFC posited that the above *dictum* by Viscount Dilhorne is H applicable in the appeals herein because the AG's decision on granting or refusing consent under s. 9(1) of Act 359 is akin to the AG's consent to criminal prosecutions, where such consent is required by statute, a significant prerogative power of the AG. Learned SFC submitted that in the exercise of these powers, the AG is not subject to control and supervision by the courts.

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**[42]** In repudiating Lord Denning's view, the House of Lords in the *Gouriet*'s case specifically relied upon an *obiter* observation by Earl of Halsbury LC in *London County Council v. Attorney-General* [1902] AC 165. In that case, Lord Halsbury had rejected the suggestion that the court could in any way impugn the exercise by the Attorney General of his discretion whether or not to give his consent to the institution of relator proceedings. Lord Halsbury said:

> The initiation of the litigation, and the determination of the question whether it is proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.

**[43]** In the same vein, Raja Azlan Shah J (as His Majesty then was) held in *Attorney-General at and by the relation of Pesurohjaya Ibu Kota, Kuala Lumpur v. Wan Kam Fong & Ors* [1967] 1 LNS 7; [1967] 2 MLJ 72:

> It is conceded that the right of the Attorney-General in the United Kingdom to bring such an action at the instance of a relator is derived from the common law and that **he has an unfettered discretion to determine whether he should bring such an action**. (emphasis added).

**[44]** Learned SFC further contended that textbooks are replete with the statements to that effect. In *Halsbury's Laws of Malaysia* (vol. 3(1) 2015 Reissue), the learned authors said at pp. 68-69:

> Under the English law, many Crown prerogative powers will not be reviewed by the courts on the grounds that they are not justiciable, such as the prerogative of entering into treaties, the defence of the realm, the granting of honours, the dissolution of Parliament and the appointment of ministers. Matters of national security are non-justiciable, provided that there is some evidence that national security is at stake. **Similarly, the courts will not review the exercise of the Attorney-General's discretion in deciding whether to bring relator proceedings**. (emphasis added)

**[45]** Learned SFC also made reference to the book entitled "*Judicial Review*", 3rd edn (London: Butterworths, 1992), by Michael Supperstone, James Goudie and Paul Walker and the learned authors had this to say at pp. 129-130:

> 7.12.3 The repositioning of the basis of judicial review by the House of Lords in *CCSU* enables us to offer a relatively simple approach to the question of unreviewable discretion ... This leaves only one substantial ground of unreviewability: that the subject matter of the power is not justiciable because its policy content renders it unsuitable for adjudication. This may apply to statutory as well as to common law prerogative powers, and the ambit of the area of unreviewability is an issue better addressed in relation to judicial review as a whole. Here it is sufficient to make a number of brief general points.

A (1) ...

...

(5) An illustration of the last point is the powers of the Attorney-General. *Dicta* of the House of Lords in *Gouriet v. Union of Post Officer Workers* that decision of the Attorney-General whether to consent to relator proceedings are not justiciable were not dependent on the categorisation of his powers as part of the prerogative and the *dicta* were therefore not in terms affected by the decision in *CCSU*. The refusal to permit review of decisions by the Attorney-General may appear anomalous in the face of the courts' general readiness to intervene by judicial review in the area of administration of justice, but recent cases have affirmed the non-reviewability of other classes of decision of the Attorney-General, in acknowledgment of his role as guardian of the public interest and the sensitive policy content of his decisions.

**[46]** Learned SFC urged this court to hold that the AG's role as the guardian of public interest in considering whether to grant or otherwise his consent pursuant to s. 9(1) of Act 359 should remain outside the court's jurisdiction. The rationale underpinning the SFC's submission is that the AG is accountable to Parliament and not to the courts. In support of his contention, learned SFC referred us to p. 524 of the *Gouriet*'s case, where Lord Fraser of Tulleybelton put it as follows:

> If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.

**[47]** Moreover, it was the learned SFC's submission that AG is not a public officer or public authority within O. 53 of the Rules of Court 2012. Based on the aforesaid reasons, learned SFC emphasised the continued relevance of the principles established in the *Gouriet*'s case and submitted that there is no rhyme nor reason for the Court of Appeal to disregard the principles laid down in the *Gouriet*'s case which conferred immunity from judicial review on the AG.

**Analysis And Findings**

**[48]** It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, *inter alia*, its justiciability. "Justiciability" concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its

administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.

**[49]** The issue of justiciability in an application for leave for judicial review was considered in great detail by Mohamad Ariff Md Yusuf J (as he then was) in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2011] 1 MLJ 28:

> Non-justiciable Issues
>
> In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.
>
> ... The most prominent amongst non-justiciable issues are those which are known in the U.S.A. as "political questions", which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).
>
> The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, "the fact remains, however, that there are some issues which are inherently unsuited to adjudication" and in this category of case, "the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand". (at p. 121).
>
> A good definition of "justiciability" can also be found in Chris Finn, "*The Concept of 'Justiciability' in Administrative Law*" in Groves & Lee, *Australian Administrative Law* (2007):
>
> > The term "justiciability" refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role. (at p. 143).

**[50]** There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of

Government, and which are unsuited to be examined by the courts. One such instance is the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (HL) ("the *GCHQ* case").

**[51]** As we have alluded to earlier, the learned SFC appearing on behalf of the appellant in Civil Appeal No. 58 and the respondent in Civil Appeal No. 59 placed emphatic reliance on the *Gouriet*'s case. This case is the seminal decision on relator proceedings. The brief facts of the case are these. On 13 January 1977, the general secretary of the Union of Post Office Workers ("U.P.W") announced on television that his union's executive committees had resolved to call on its members not to handle mails transmission between the United Kingdom and South Africa for a week beginning 16 January 1977, as a protest against the apartheid police then in force in South Africa. Such interference with postal communications constituted an offence under s. 68 of the Post Office Act 1953 (UK), which provides:

> If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under the Act, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years.

**[52]** The news of this threat by the U.P.W to break the law and bring about the interruption of postal services to South Africa annoyed John Gouriet. On the following day (14 January 1977), he applied to Mr Sam Silkin, QC, the Attorney General (AG) for the latter's consent to a relator action for an injunction to refrain the U.P.W from calling the strike. Silkin QC had refused to consent and quite undeterred, Gouriet issued a writ in his own name (thus making himself - and not the AG - the plaintiff) against the U.P.W, seeking an injunction against the latter. Because this action would not be heard in time to prevent the imminent strike, Gouriet applied on the same day (14 January 1977) to Stockers J (in chambers) for an interim injunction matching the terms of the final injunction sought in the main substantive action. Stockers J dismissed the application on ground that he had no power to make the order requested. Stockers J was of the view that Gouriet had no *locus standi* to bring the main action, given the fact that the AG had refused to act as plaintiff in such an action.

**[53]** Mr Gouriet then appealed to the Court of Appeal (*Gouriet v. Union Of Post Office Workers And Others* [1977] 2 WLR 310). Before the Court of Appeal, Silkin QC had followed convention by refusing to disclose the reasons for his decision on the ground that he was only accountable to Parliament. He further submitted that the court did not have jurisdiction to grant the interim injunction because only he, the AG, would have had the necessary standing to sue on behalf of the public.

**[54]** One of the main issues before the Court of Appeal was whether a court of law could review or override the effect of a refusal of consent by the AG, even where such refusal might have been based on corrupt motives or bad faith. Pronouncing upon the AG's discretion in regard to the matter of consent, Lord Denning said at p. 328:

> It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say "Very well then. If you do not give your consent, or your reasons, we will hear the complaint of this citizen without it."

**[55]** The proposition that the Gouriet was entitled to maintain an action for injunction in his own right was, on the other hand, rejected by Lawton and Ormrod LJJ. Both their Lordships also emphatically acknowledged that the AG could not be compelled either to give his consent to a relator action, or to disclose his reasons for refusing such consent.

**[56]** By the time the case reached the House of Lords, Gouriet had abandoned his claim that the AG's decision was improper or that it could be reviewed by the court. Nevertheless, after ruling that the Court of Appeal had no power to grant him an interim injunction, their Lordships (Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Edmund-Daview, Lord Fraser of Tullybelton) emphatically and unanimously rejected Lord Denning's view that the court had the power to review the AG's decision and upheld Silkin QC's contention that he was accountable to the public only through Parliament.

**[57]** With respect, we are unable to agree with the learned SFC that the orthodox common law immunity from judicial review of the AG's prerogative powers laid down in the *Gouriet*'s case is still good law in view of the House of Lords decision in the *GCHQ*'s case. The judgment in the *Gouriet*'s case is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power.

**[58]** The brief facts of the *GCHQ* case are these: The respondent had, in exercise of her prerogative powers conferred upon her by the Civil Service Order in Council 1982, changed the terms of service of the intelligence officers at the Government Communications Headquarters (GCHQ) by banning them from joining trade unions, citing national security concerns. The union then sought judicial review of the decision on the ground of unfairness. It was the unions' contention that the courts could review the

decision despite it having been made under prerogative powers, something that was previously considered to be not examinable by the courts. They claimed that the Government had not consulted the workers, and therefore there was a ground (procedural unfairness) for judicial review since a legitimate expectation of prior consultation had been established.

**[59]** In an affidavit, the Secretary to the Cabinet claimed that prior consultation could have disrupted and exposed vulnerable areas of GCHQ's operations. The House of Lords accepted the respondent's explanation that the requirements of national security outweighed those of fairness. The House of Lords accepted that national security concerns are the purview of the executive, and a question regarding national security is considered to be unjusticiable. However, their Lordships held that the respondent's decision would have otherwise been vitiated by her failure to consult, and would have been amenable to judicial review even though she acted by virtue of a prerogative power. In his judgment, Lord Scarman after having referred to the authorities of *R v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (DC) and *R v. Secretary of State for Home Department, ex parte Hosenball* [1977] 1 WLR 766 (CA), stated at p. 407 that the modern law of judicial reviews had overwhelmed the old restrictions on the justiciability of the prerogative:

> The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power … Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

**[60]** This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p. 401D of the *GCHQ* case enunciated three classic grounds for judicial review:

> Judicial review has I think developed to a stage today when … one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety." …
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By 'irrationality' I mean what can now succinctly be referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in it defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

**[61]** The prerogative powers of the AG were not expressly considered in the *GCHQ* case. However, the necessary implication of the decision is that these powers (once considered unreviewable) are now potentially open to judicial scrutiny by the courts, except for a list of prerogatives that Lord Roskill categorised as being non-reviewable "because their nature and subject matter are such as not to be amenable to the judicial process".

**[62]** Writing in *Public Law* in January 2010, Sir Louis Blom-Cooper QC and Richard Drabble QC, revisited the *GCHQ* case, calling it the "*locus classicus* of a modern public law" and noting that it "effectively buried the old concept of the prerogative power was unreviewable judicially" (see Sir Louis Blom-Cooper and Richard Drabble, "GCHQ revisited", *Public Law*, January 2010, pp. 18-24).

**[63]** Subsequent cases show that this list has largely been accepted, and there is indication that judges have continued to move with a degree of circumspection, and even in reaction against such development (see Leyland & Anthony, "*Express and Implied Limits on Judicial Review: Ouster and Time Limit Clauses, the Prerogative Power, Public Interest Immunity*", Textbook on Administrative Law (6th edn, Oxford University Press 2009 pp. 392-437 at 414). However, in the case of *Campaign for Nuclear Disarmament v. Prime Minister* [2002] EWHC 2777 (Admin); ILDC 662 (UK 2002), Lord Maurice Kay accepted that the ambit of the "forbidden areas", identified by Lord Roskill in the *GCHQ* case is not immutable, and had been reduced in some cases (para. 50).

**[64]** The attitude of the courts in the United Kingdom is summarised in the *obiter* comments of Lord Justice Simon Brown in *R v. Ministry of Defence, ex parte Smith* [1995] EWCA Civ 23, [1996] QB 517 at 539:

> To my mind only the rarest cases today be ruled strictly beyond the court's purview - only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue.

**[65]** The case of *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] 3 WLR 955, *"Bancoult (No. 2)"* concerned a challenge to the UK Government's decision not to repatriate inhabitants of the Chagos Archipelago, a group of about 60 islands in the Indian Ocean. Originally a French possession (and leper colony), it was ceded to Britain after Napoleon's defeat in 1814. The Archipelago was turned into a separate territory (the British Indian Overseas Territory) in 1965 and depopulated in order to make room for a US military base on the Archipelago's chief island, Diego Garcia. All this was achieved through the exercise of prerogative powers - first the BIOT Order 1965 and then the Immigration Ordinance 1971, which gave the newly established BIOT Commissioner the authority (in colonial boilerplate) to 'make laws for the peace, order and good government of the territory'.

**[66]** One of the issues before the House of Lords concerned the general question of the reviewability of prerogative legislation. The Law Lords unanimously ruled that judicial review applied. While it is true that prerogative Orders in Council are a type of primary legislation they said, it does not follow that they share all the characteristics of Acts of Parliament, in particular their immunity from judicial review.

**[67]** Lord Hoffman said at para. 35:

> The fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality, although it may be legislative in character, it is still an exercise of power by the executive alone.
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> ...
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> I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.

**[68]** The House did, however, rule that the orders evicting the inhabitants were lawful, primarily due to the interdiction of the Colonial Laws Validity Act 1865.

**[69]** We also make reference to the case of *Brown v. Executor of the Estate of HM Queen Elizabeth, the Queen Mother* [2008] 1 WLR 2327 EWCA. The brief facts of that case are these: Following the death in 2002 of Princess Margaret and the Queen Mother, litigation was brought by a Mr Andrew Brown who claimed to be an illegitimate son of the late Princess Margaret. He also sought to inspect the will of the late Queen Mother. It appears that the general practice is that Royal Wills are sealed.

**[70]** The Court of Appeal held that a private individual was entitled, in public interest, to have a substantive hearing of his claim to inspect the wills of members of the Royal family. Lord Phillips MR observed at para 38:

> The conclusion (of the House of Lords in *Gouriet's* case) that, in the absence of the consent of the Attorney-General, Mr Gouriet was barred from pursuing the proceedings was based the analysis of the statutory provisions in issue. By contrast, there is nothing on the face of section 124 of the Supreme Court Act 1981 to suggest that the court may only exercise its powers under it on an application by the Attorney-General.

**[71]** The decision of the case above would suggest that the decision in *Gouriet*'s case is no longer good law and that the basis upon which it was decided no longer prevail. The present position is the AG is no longer regarded as the sole guardian of what is public interest, which was a central principle of the decision in the *Gouriet*'s case.

**[72]** It is interesting to note that in England, private individuals may now properly seek judicial review of decisions of the Public Prosecutor whether or not to initiate criminal proceedings. This power does not exist at the time of the judgment in the *Gouriet*'s case. In *R (B) v. Director of Public Prosecutors (Equality and Human Rights Commission intervening)* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072, it was held at p. 52:

> The exercise of the Court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional.

**[73]** The courts in England have consistently held that private individuals may seek judicial review of decisions of the Public Prosecutor not only in matters of initiation or failure to take court proceedings or to discontinue police investigations, but additionally of decisions whether to take over or discontinue ongoing private investigations (see *R v. DPP, Ex parte Duckenfield* [2000] 1 WLR 55 per Laws LJ at pp 67 - 68 and *R v. Crown Prosecution Service* [2011] EWHC 472 (Admin), [2011] 2 Cr App R 12 at para 147).

**[74]** The legal principle propounded in the *GCHQ* case enjoy considerable support from the decision of a very strong bench of Law Lords sitting as the Judicial Committee of the Privy Council in the case of *Mohit v. The Director of Public Prosecutions of Mauritius* [2006] UKPC 20 (25 April 2000). In that case, the Mauritian Director of Public Prosecutions ("DPP"), who enjoys similar prosecutorial powers to the English AG, filed a *nolle prosequi* and terminated the proceeding each time the appellant tried to bring a private prosecution against a senior politician. The appellant requested leave to apply for judicial review from the Supreme Court of Mauritius but the court

upheld the DPP's argument that the effect of the decision in the *Gouriet*'s case was that the exercise of the DPP's powers was not amenable to judicial review.

**[75]** However, on appeal to the Privy Council, the DPP, in an apparent attempt to avoid the adverse implication of the *GCHQ* case for the *Gouriet*'s precedent, supported the decision of the Supreme Court by relying less on the source of the power to enter a *nolle prosequi* than on the nature of the decision to enter one. Relying on the Supreme Court's decision in *The State v. Ilori* [1983] 1 SCNLR 94 - that the controlling factor in determining whether the exercise of prerogative power is justiciable is its subject matter - the DPP contended that a prosecutorial decision 'involves the assessment of factors which the courts cannot and should not seek to review'. The Privy Council emphatically rejected this contention, and refused to disturb what it described as "the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review." Lord Bingham, who delivered the judgment, indicated at para. 14 that Viscount Dilhorne's *dictum* in the *Gouriet*'s case could now be "reviewed or modified in the light of the later decision of the House of Lords in the *GCHQ* case".

**[76]** Singapore's courts have repeatedly affirmed that all powers are subject to legal limits. In *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525, [1988] SGCA 16, para. 86; *Tan Seet Eng v. Attorney-General* [2016] 1 SLR 779, [2015] SGCA 59, paras 1-2.), the courts held thus: "under the law, the AG'S discretionary power is not absolute and he must act according to law, as his prosecutorial power is subject to legal limits. Prosecutorial discretion cannot be exercised in bad faith, or in a manner contrary to the quality guaranteed under art. 12 of the Constitution" (see *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR(R) 49, [2007] SGHC 207, para. 148).

**[77]** Reverting back to our present appeals, we have carefully considered the judgment of the Court of Appeal in Appeal No. 58 while keeping in mind the principles of law on the subject as propounded by the courts in other jurisdiction. We found there was no flaw in its reasoning in holding that the power of the AG to give or refuse consent under s. 9(1) of Act 359 is amenable to judicial review. We are in total agreement with the Court of Appeal's reasoning as alluded to earlier in para. [18].

**[78]** On the issue whether Attorney General is a public officer, we are of the view that the matter has been settled by the decision of Supreme Court in *Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294; [1988] 3 MLJ 149 (SC) where it was held that AG is indeed a public officer under the Federal Constitution and art. 145 gives ample power to the AG to represent the Government or person performing any functions under the Constitution.

**[79]** The AG's discretionary power to give or refuse consent pursuant to s. 9(1) of Act 359 derives from a statute law and any restrictions and conditions applicable to statutory power cannot be ignored.

**[80]** In this context, it is useful to reproduce Professor Edwards' opinions on the issue of justiciability of the statutory prosecutorial powers of the Attorney-General, which was approved by the Privy Council in *Mohit*. According to him:

> Since the source of the discretionary power rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked such as arise with respect to the prerogative powers of the Law Officers of the Crown. Most of the celebrated cases which have been concerned with the reviewability of the Attorney-General's decisions fall within this latter category ... These powers derive from the prerogative authority vested in the Attorney-General and must be carefully distinguished from the discretionary powers that owe their origin to the actions of Parliament and which are to be found embedded in the long list of statutory provisions.

(See John Llewelyn Jones Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, London 1984) pp. 29-30)

**[81]** Before concluding the present appeals, we would like to reiterate the important pronouncement in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561. In this case, the Federal Court emphatically declared that the power of judicial review "cannot be changed or altered by Parliament by way of a constitutional amendment". The court further stated, "The power of judicial review is essential to the constitutional role of the courts, and inherent in basic structure of the constitution". The Federal Court's reassertion of constitutional judicial power and its status as superior court meant that the power of the AG to grant or refuse consent under s. 9(1) of Act 359 is amenable to judicial review.

**[82]** In *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lembah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Raja Azlan Shah CJ (Malaya)(as His Majesty then was) said at p. 148:

> Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of

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> the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in *Bradbury v. London Borough of Enfield*).

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**[83]** We hasten to add that unfettered discretion is contradictory to the rule of law. Therefore, the AG's power to give consent or otherwise under s. 9(1) of Act 359 is not absolute and is subject to legal limits.

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**[84]** In the same vein, the Singapore Court of Appeal in *Chng Suan Tze v. Minister for Home Affairs* (*supra*) said at para. [86]:

> In our view, the notion of a subjective or unfettered discretion was contrary to the rule of law. All powers has legal limits and the rule of law demands that courts should be able to examine the exercise of discretionary power.

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**[85]** For all the reasons given above, we would answer the leave question in Civil Appeal No. 58 in the negative and the leave question in Civil Appeal in No. 59 in the affirmative. Consequently, we dismissed the appellant's appeal in Civil Appeal No. 58 and we allowed the appellants' appeal in Civil Appeal No. 59. No order as to costs. So ordered.

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